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No. 91-1396

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ABIGAIL MARSHALL, *et. al.*,

Petitioners,

vs.

DEPARTMENT OF SOCIAL SERVICES, *et. al.*,

Respondents.

Petition for a Writ of Certiorari to the
Court of Appeal for the State of California
First District, Division Three

REPLY TO BRIEF IN OPPOSITION

DONALD BERGERSON*
ABIGAIL MARSHALL
2431 Fillmore Street
San Francisco, CA., 94115
Telephone: (415) 621-8149

Petitioners *in propria persona.*

*Counsel of Record

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REPLY TO BRIEF IN OPPOSITION

I
THIS CASE, ACCURATELY SUMMARIZED IN THE PETITION, PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS ON A 'CLEAN' RECORD

Respondents argue that "this is a case decided on factual issues and does not rise to the level of a federal case." (Oppos. at 19) In furtherance of this claim, respondents accuse petitioners of misrepresenting facts, and proffer facts of their own which depict petitioners as insensitive and self-absorbed.

Respondents' portrayal of this case as no more than a messy factual dispute should not dissuade this court from granting certiorari. The fact statement in the petition was not one-sided, but tracked the opinion of the Court of Appeal. Moreover, the *record* contradicts respondents' one *material* claim (that petitioners waited a long time to request custody). The remainder of respondents' factual assertions, while unflattering, were not material to the decision of the trial and appellate courts. Finally, respondents' brief illustrates how cases like this can become infected by *ad hominem* attacks which would not be possible were the rights and options of relatives more clearly established in cases such as this; this need for definition is a reason to *grant* certiorari, rather than to deny it.

It should be borne in mind that the important constitutional issues at stake in this case *definitionally* arise in controversies over child custody, which by their nature provoke strong emotions and yield conflicting testimony; the factual complexities of this case are therefore not unique, but typical, and it would be a cruel irony were this Court to permit heartache in similar *future* cases by declining to decide *this* one[1].

(A)
The Opinion of the Court of Appeal Comports
With Petitioners' Statement of Facts

Petitioners based the fact statement in their certiorari petition on the opinion of the Court of Appeal. It is difficult to comprehend why respondents find this objectionable[2], since that opinion was avowedly written to view "all factual matters ... most favorably to the prevailing party." (Pet. Cert. App. 1 at 2) If the appellate opinion confirms petitioners' version of events, it is not because it was "slanted," but because it was faithful to the trial record.

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1. Respondents' brief overstates the factual complexity of the case by claiming it entailed four weeks of testimony. (Oppos. at 3, 7) In fact, the trial lasted over *portions* of 8 days, and the record of testimony is some 1,200 pages long.

2. Respondents scoff at petitioners for citing "not the factual record, but only the Court of Appeal's opinion, for their assertions," (Oppos. at 9), as if citing to an appellate opinion were somehow improper.

(B)
Respondents' Allegation That
Petitioners Initially Failed to Request
Custody Is Contradicted By The Record

Only one of respondents' attacks on petitioners is material to the outcome of this petition: respondents' often-repeated claim that, contrary to their representations, petitioners delayed considerably before requesting custody of their niece. (Oppos. at 4, 5, 8, 9, 13, 18, 19, 22-23, 29)

Respondents' claim is simply untrue. The first item in the record, a report prepared when Cassandra was but two weeks old, states that "Ms. Abigail Marshall and her husband, Mr. Bergerson, expressed interest [in taking custody of her]." (R. 3: par. 5) Further, (contrary to respondents' brief (Oppos. at 22)), the request *was* renewed at the time of "disposition" in December of 1988, where Cassandra's father's counsel represented that petitioner Bergerson "was here last time and has confirmed that he and Stanley's sister can take Cassandra when conditions permit."[3] The fact that the trial court concluded the proceeding by ordering a progress report on relative placement, (Tr. I:12), demonstrates that the court understood the relatives had requested placement[4].

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3. The "conditions" referred to were the Department's representations concerning Cassandra's health.

4. Respondents make the point that petitioners did not personally appear at this and other early hearings in the case. (Oppos. at 1-2) Petitioners were not parties, and often had no *notice* of such hearings. Moreover, Abigail Marshall *did* appear, at yet another, subsequent hearing, to

(C)
Respondents' Remaining 'Factual'
Quibbles Are Irrelevant to
The Question of Granting Certiorari

Most of respondents' brief is dedicated to showing that petitioners' equivocated in requesting custody of Cassandra; explored alternative placements; and, in any event, acted out of selfish motives; the implication is that the facts (or petitioners) are too "impure" to merit review by this Court.

Page limitations prevent a line-by-line review of all of this material. Much of it consists of suggestive language[5],

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...Continued...

request custody, only to learn that the hearing was postponed. (Pet for Cert. App. 1 at 4)

5. Respondents employ a trick usage of the word "adopt." By loosely describing petitioners' desire to establish a *guardianship* over Cassandra as a refusal to *adopt* her, the reader is left with the inaccurate impression that petitioners never asked for *custody* at all. (Oppos. at 5, 13, 19)

Another example: respondents suggest that petitioners misrepresented that Cassandra was Jewish (Oppos. at 13, fn. 8) In fact, they claimed that *they* were Jewish and sought to raise Cassandra in her father's faith. (Moreover, Abigail testified that according to the tenets of *reform* Judaism, Cassandra is *indeed* regarded as Jewish 'through' her father). (Tr. 657-658)

A final example: respondents fault petitioners' psychiatric expert for never having evaluated Cassandra personally. In fact, he was prevented from doing so because respondents obtained an order barring such an examination. (Tr. 865-877)

hearsay[6], or is simply not borne out by the record[7] Much else consists not of 'facts,' but interprative asides made by the social worker at trial or introduced in this Court for the first time by respondents' counsel[8].

However, line-by-line refutation of respondents' claims is unecessary; none of the new 'evidence' in the the opposition brief is relevant to this Court's decision to grant certiorari. The *most* that can be inferred from respondents' statement of facts is that petitioners did not finalize their demand for custody until December of 1989, when Cassandra was fourteen months of age. (Oppos. at 13).

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6. Respondents suggest that petitioners clashed with Cassandra's mother. (Oppos. at 14) In fact, the mother did not appear at trial, and testimony in this regard was hearsay from the social worker who admitted that the mothers' sentiments went "back and forth." (Tr. I:123) Petitioners in fact, assisted the mother with drug rehabilitation at the outset of the case (R. 17) and took her into their home; the psychologist, Heineman, stated in her report to the court that the mother retained a good relationship with petitioner Bergerson. (R. Ex. 2)

7. For example, respondents claim that petitioners intended to curtail contact between Cassandra and maternal relatives; in fact, the maternal aunt (who otherwise testified *against* petitioners), testified that petitioners offered a visitation schedule, and petitioners testified they would allow complete and open access.

8. For example, respondents claim that visitation between Cassandra and petitioners was limited by court order because it was detrimental (Oppos. at 3); the record reflects no such order, and indeed, the court refused to make a ruling on the issue. (Tr. 38)

Respondents concede that a request by petitioners for placement, even as "late" as this, would have been timely (Oppos. at 23, 24); at trial, respondents' social worker conceded that petitioners had passed no deadlines in making their request. (Tr. I:178-179)

The defining moment in this case came when the foster parents *themselves* belatedly decided to adopt. When the state announced that it favored the foster family, the result was a classic contest between the claims of extended family members and the plans of state welfare workers. *This* contest plainly framed the constitutional issues raised by petitioners in this Court, and it is the outcome of *this* trial that petitioners ask this Court to review. That the record reveals even *earlier* demands by petitioners is but "icing on the cake"; and that petitioners may have, on occasion, displayed self-centeredness is irrelevant to the central fact of their custody request and its constitutional implications[9].

(D)
Respondents' Statement of Facts
Underscores the Importance of
The Due Process Claim Posed
In Question 4 of the Petition

The "objective" record in this case shows that petition-

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9. Petitioners are not conceding, of course, that they are the brutes portrayed by respondents; most of the perjorative testimony against them was contradicted by them and their witnesses. The *point* is that neither the perjorative testimony *nor* the contradictions are relevant to the constitutional claims made here; the perjorative testimony is just "dirt" respondents have heaped on petitioners in hopes that this Court will dislike them enough to deny relief.

ers requested custody of Cassandra early and often; it is the "subjective" record of uncorroborated 'impressions' by social welfare professionals which respondents cite in their brief to show otherwise. Ironically, far from militating against granting certiorari in this case, the availability of such subjective evidence militates in favor of doing so.

Reliance on subjective assessments of the "sincerity" of a request for custody is the inevitable byproduct of a regime which regards such requests *not* as the dispositive assertion of a *right,* but merely as one of the competing claims to be weighed by the welfare worker in determining a child's "best interest." Moreover, questions of custody are fated to turn on subjective impressions when there is no objective *procedure* for logging a request for placement. Indeed, the ease with which a disapproving social worker can disparage a placement request through perjorative 'assessments' of the motivations underlying it is illustrative of the "unusual ability to structure the evidence," [*Santosky v. Kramer* 455 U.S. 745, 763, fn. 3 (1982)], possessed by social welfare agencies in dependency cases.

In question four of their certiorari petition, petitioners asked this Court to explore the "minimum requirements of procedural due process" necessary to implement California's purported relative placement preference. The instant case demonstrates the practical importance of resolving that question.

II
RESPONDENTS' SUBSTANTIVE *LEGAL* ARGUMENTS ARE WITHOUT MERIT

Respondents' brief does not contain an elaborate legal discussion. Even so, respondents raise *some* points of law which merit reply.

1. Respondents argue that California's statutory scheme adequately protects relatives. (Oppos. at 20-22) Ironically, respondents cite to *In re Baby Girl D.* 208 Cal. App. 3d

1489, 257 Cal. Rptr. 1 (1989) as descriptive of the rights enjoyed by relatives. *Baby Girl D.* held that the sole occasion for placing a dependent child with a relative is to give it a *temporary* home while the parent works to recover custody. In the instant case, of course, there was no hope that Cassandra's father, who was in prison, could recover custody; by citing *Baby Girl D.,* respondents confirm petitioners' allegation that California law refuses to recognize any *independent* custodial rights accruing to extended family units in cases such as theirs.

2. In opposition to petitioners' reliance on *Moore v. City of East Cleveland* 431 U.S. 496 (1977), respondents argue that neither California "courts nor any state lawmakers have interpreted *Moore*" in accordance with petitioners' claims. (Oppos. at 27) If this is indeed an accurate statement of California law[10], it underscores the need for consideration of the question by this Court.

3. Respondents argue that the needs of children must be assessed in terms of their "best interests" rather than interms of the "absolute" rights of third parties. (Oppos. at 28) This argument wrongly assumes that family court judges have only two options: an unadorned "best interests" analysis or adherence to a rigid requirement that every child end up placed with relatives. Petitioners advocate a *third* course: recognition of clear but flexible rights in extended family units, a recognition that has already been extended, by *Moore, supra,* to the comparatively trivial area of zoning. Petitioners concede state power to "regulate" extended families; what the state does

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10. In support of their contention, respondents cite to *In re Albert B.* 215 Cal. App. 3d 361, 263 Cal. Rptr. 694 (1989), yet another California case disparaging the rights of near-relatives in dependency cases. This case illustrates, rather than refutes, petitioners' grievance against California law.

not have is the power to place children for adoption by strangers (as opposed to equally nurturing and enduring guardianship with relatives) merely because it is in their asserted "best interest" to do so. In short, petitioners advocate not "absolutes" but genuine flexibility which considers the long-range needs of both children *and* kin for the sense of 'place' and purpose that family bonds promote.

4. Respondents criticize petitioners for failing to "suggest how the court is to reconcile the competing 'rights' of the relatives and the parents." (Oppos. at 24) The short answer to this criticism is that petitioners never claimed any rights "against" the parents. The rights of extended families, like *any* rights, are asserted against the *state.*

5. Finally, running through respondents' entire brief are lyrical descriptions of Cassandra's emotional ties to the foster family with which she ended up after the relatives' early requests for placement were denied; respondents also dwell at length on the devastation that Cassandra (or *any* child) would suffer were those ties severed. (Oppos. at 15-17)

Petitioners would be the last to disparage the emotional needs of a child. Indeed, one reason that they sought custody of their niece was to endow in her that sense of emotional self-worth that only a sense of biological 'belonging' can bestow.

That continuity of relationships may be a primary requirement for proper child development, (Oppost. at 23, fn. 11), is the most important reason to place dependent minors with near kin at the *earliest possible* stage of the dependency process.

Concededly, the emotional bond of a child to an existing caretaker is an important factor to be considered in making a placement decision. What went amiss *here* is that such bonds were artificially vested in a foster family as the result of refusal by a welfare agency to recognize that relatives have important rights, and that these bonds were

the *only* factor considered by the trial court in making its placement decision once the relatives obtained leave to appear.

CONCLUSION

Any custody dispute is factually complex and, when the state is a party, derogatory observations by social workers can clutter the record considerably. Respondents seek to convince this Court that because such perjorative testimony was adduced here, this is a fact-based case unworthy of review. Not so. This is a typical case, unique only in that the record shows an early placement request by relatives and because the relatives are, despite respondents' perjoratives, *obviously* "fit," tenacious, and stalwart in their love for kin. This case is emblematic and representative of countless similar tragedies. It would only compound *all* such tragedies were this Court to deny review merely because respondents have continued to confuse the issues *here* just as they sought to do at trial.

This case comes to this court on a clean, clear record; the Court of Appeal had no trouble reaching the constitutional issues posed in this petition; the only criticism petitioners have of that Court is that it resolved the questions wrongly. The time has come for *this* Court to set matters right. Certiorari should be granted to settle a constitutional question of core importance to every American family.

DATED: May 21, 1992 Respectfully Submitted:

ABIGAIL MARSHALL
DONALD BERGERSON*
2431 Fillmore St.,
San Francisco, CA., 94115
Telephone: (415) 621-8149
Petitioners *in pro. per.*
*Counsel of Record